UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

MARK BATES, Petitioner, v. KEN CLARK, Warden, Respondent.	Civil No. 07cv0330-H (BLM) **REPORT AND RECOMMENDATION FOR ORDER DENYING PETITION FOR WRIT OF HABEAS CORPUS**

This Report and Recommendation is submitted to United States District Marilyn L. Huff pursuant to 28 U.S.C. § 636(b) and Civil Local Rules 72.1(d) and HC.2 of the United States District Court for the Southern District of California.

On February 20, 2007, Petitioner Mark Anthony Bates, a state prisoner who is proceeding *pro se* and *in forma pauperis*, commenced these habeas corpus proceedings pursuant to 28 U.S.C. § 2254. Doc. No. 1. Petitioner challenges his conviction for second degree murder.

This Court has considered the Petition ("Pet."), Respondent's Answer and all supporting documents submitted by the parties. For the reasons set forth below, this Court **RECOMMENDS** that Petitioner's

Petition for Writ of Habeas Corpus be **DENIED**.

FACTUAL AND PROCEDURAL BACKGROUND

A. Petitioner's Conviction and Sentence

The following facts are taken from the California Court of Appeal's opinion on direct review in People v. Bates, No. D045113, slip op. (Cal. Ct. App. Dec. 19, 2005). See Lodgment 5. This Court presumes the state court's factual determinations to be correct absent clear and convincing evidence to the contrary. 28 U.S.C. § 2254(e)(1); Miller-El v. Cockrell, 537 U.S. 322, 340 (2003); see also Parke v. Raley, 506 U.S. 20, 35-36 (1992) (holding findings of historical fact, including inferences properly drawn from such facts, are entitled to statutory presumption of correctness).

> FACTUAL AND PROCEDURAL BACKGROUND
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> Bates, a transient, murdered another transient, the victim Jose Sanchez, by repeatedly bashing his head with large rocks until his head and face were virtually unrecognizable. The People argued at trial that Bates premeditated and deliberated the crime. Bates did not contest the fact that he killed Sanchez. Rather, Bates argued the offense was no more than manslaughter.
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> A. *The Homicide*
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> At approximately 10:00 p.m. on October 21, 2003, San Diego police officers responded to a 911 call made by Sandra Ruiz, who was inside the Centro Cultural de la Raza (the center), located at the edge of Balboa Park. Ruiz was rehearsing for a play. Ruiz reported to police that Bates had banged on the door to the center and told her to call the police because there was someone outside "and it looks like they got their face bashed in." Ruiz did not open the door, instead viewing Bates through the video intercom system.
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> When officers arrived they found Sanchez lying dead on the south side of the center. His head was crushed beyond recognition until he appeared headless. Sanchez was surrounded by debris, most of which was either blood stained or had brain tissue from the victim. There were four separate rocks near the victim. It was later determined that the rocks

weighed 6.5, 10.5, 19, and 36.5 pounds. The rocks were covered with Sanchez's blood and brain tissue.

Bates was soon discovered and contacted on the north side of the building, walking away from the scene. His pants had blood on them. His sweatshirt was on inside out, with no visible blood on it. However, it was later determined that there was blood on the outside of the sweatshirt. Bates did not seem drunk and there was no scent of alcohol on his person. Bates asked for his backpack, which he said was by the playground area.

In response to some initial questions, Bates told police that he knew Sanchez and had banged on the door for help. He told police that he and others, including Sanchez, had been drinking earlier and having a barbeque in the park. The group started drinking around 3:00 pm. Bates later left for about 40 minutes. When he returned, he found Sanchez in the grass and thought he was asleep. He first kicked him to try to wake him up. He explained that he had gotten blood on his pants when he attempted to resuscitate Sanchez. Bates also told an officer that the officer would probably hear that he and Sanchez had had a fight earlier, but explained it was "no big thing" because they were transients. Bates asked the officer if he thought he needed a lawyer.

Medical examiner and supervising pathologist Dr. Steven Campman opined that Sanchez died as a result of blunt force impact injuries to his head. Much of Sanchez's head above his upper lip had been "torn apart" as a result of his injuries. He had multiple fractures of his facial bones, his jaw bone, and his skull. Sanchez's brain had been pushed out of his skull as a result of the injuries. Dr. Campman compared his injuries to those being caused by a person having their head smashed between a car and the road in a rollover accident or a shotgun blast to the head. Sanchez also had fractures to the right and left ribs, a broken shoulder blade, and lung and liver lacerations, all consistent with someone jumping on his torso repeatedly. Dr. Campman utilized a photograph of Sanchez's head area, taken at the autopsy, to assist in his testimony.

Sanchez's blood alcohol level measured 0.39 percent. At 0.20 percent most individuals would be unconscious, unless the person had built up a tolerance to alcohol.

Blood spatter expert Brian Kennedy testified that the blood spatter on Bates's (sic) jeans and the dispersal of blood patterns up his pants suggested

that he was "relatively close," "within inches" of Sanchez when his injuries occurred. Kennedy also testified that the blood stains were inconsistent with Bates kneeling and administering CPR to Sanchez. The blood staining he observed was consistent with multiple blows. The blood staining on Sanchez indicated that he was lying on his back at the time of his injuries.

B. *Custodial Interview of Bates*

After Bates was placed in custody, he was interviewed by homicide detectives Kenneth Brown and Ed Valentine at 1:30 a.m. the following morning. Bates was given his *Miranda* warnings. Bates indicated he understood those rights, and the interview commenced. Bates initially denied murdering Sanchez, stating that he tried to give him CPR by pushing on his chest. Bates stated that he did not notice the condition of Sanchez's head because it was dark.

Bates described an incident that occurred between himself and Sanchez earlier in the day, but initially denied that the incident was violent. The interviewing detectives suggested that the argument had turned into a fight that had gotten out of control. Detective Brown asked, "Isn't that what happened?" Bates replied, "*I'm not saying anything right now.*" (Italics added.) Detective Brown explained that they were giving Bates an opportunity to clarify what happened at the scene, and told him he understood that sometimes "things get out of control." Detective Brown then asked if Bates had tried to get help for Sanchez and he replied, "I sure did."

Detective Brown explained that he believed they both knew what had happened and that he wanted to find out the truth of the matter. Detective Brown asked Bates, "Why don't you tell us what happened?" Bates replied, "I just want to know what I'm facing?" Detective Brown replied that it was up to the district attorney to make that determination and then asked, "Did you hurt that man? Why don't you just tell us what happened?" Bates responded, "Yea[h], I hurt him." Bates stated that he "got mad," picked up a rock, and "bashed" Sanchez's head in four times. Bates explained that he waited until Sanchez fell asleep, and then, using two rocks, he hit him in the head with the larger rock and in the rib cage with the second rock. Bates also admitted to kicking him "violently."

Bates later attempted to excuse his actions, claiming that Sanchez was yelling in Spanish at him right before he hit him with the rock. He also

> claimed that Sanchez was trying to get up and hurt him and that before he struck him, Sanchez was "coming at [him]."
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> C. *Defense Case*
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> Raymond Murphy, a psychologist, interviewed and tested Bates. He opined that Bates's IQ was 75 and that he was at the borderline level of retardation. He also testified that Bates was dysfunctional in his adaptive reasoning, making it difficult for him to find a place to live and work for a living. According to Murphy, Bates was capable of surviving, but could not adapt within a normal range of living skills. Murphy scored Bates as a six- to eight-year-old in terms of his basic psychomotor skills. Murphy also testified that Bates functioned emotionally as an eight-to ten-year-old, resulting in difficulty in decisionmaking, planning, setting goals, frustration and tolerance. Alcohol would further impact his impulse problems and frustration levels.
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> Bates's mother testified that he did not walk until he was over two years old, had a difficult time functioning, and was "kind of slow." He was in special education classes in school and his speech was poor. Bates kept to himself as a child.
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> D. *Rebuttal*
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> Psychologist Lynette Rivers, testifying for the prosecution, also tested Bates. She concluded that Bates had an IQ of 79, which did not qualify as retarded. Rather, Rivers testified that Bates had "borderline intellectual functioning." Bates told Rivers that he had no difficulty controlling his anger and could not think of anything that could make him angry. Rivers also noted that Bates used sophisticated words when interviewed by police, which denoted some higher-functioning verbal abilities. Bates's answers to questions indicated a degree of sophistication and planning as he constructed different explanations for what had occurred. However, Rivers did admit that Bates's scores indicated some neurocognitive problems that did not fall with the normal range and that he was functioning at a level less than that of one percent of the population.

Lodgment 5 at 2-7.

On July 9, 2004, a jury found Petitioner guilty of one count of second degree murder (in violation of California Penal Code

§ 187(a)) and further found that Petitioner personally used a deadly and dangerous weapon – a rock – in the commission of the murder (in violation of California Penal Code § 12022(b)(1)). Lodgment 1, vol. 2 at 310, 346; Lodgment 2, vol. 4 at 632. The trial court sentenced Petitioner to fifteen years to life for the murder conviction and to one additional year, to run consecutive to the first sentence, for using a deadly weapon, resulting in a total term of sixteen years to life in prison. Lodgment 2, vol. 4 at 644.

B. Direct Appeal

Petitioner appealed to the California Court of Appeal, Fourth Appellate District, Division One, asserting four claims for relief. Lodgment 3. Specifically, Petitioner alleged (1) that the trial court deprived him of his Fifth, Sixth, and Fourteenth Amendment rights by improperly allowing the jury to hear statements he made to police in violation of Miranda v. Arizona, 384 U.S. 436, 473-474 (1966) (based on the fact that he did not knowing and voluntarily waive his Miranda rights and later unequivocally invoked his right to remain silent), (2) that he was deprived of federal and state due process when the trial court failed to instruct *sua sponte* on the meaning of unreasonable self-defense (CALJIC 5.17), (3) that the trial court abused its discretion under California Evidence Code § 352 by admitting inflammatory and unnecessary photographs of the victim's massive head wounds, and (4) that the cumulative effect of these errors required reversal. Id. In an unpublished opinion filed on December 19, 2005, the California Court of Appeal affirmed the conviction. Lodgment 5.

On January 18, 2006, Petitioner filed a petition for review in the California Supreme Court, raising the same claims set forth

in his direct appeal to the appellate court with the exception of the cumulative error allegation. Lodgment 6. On February 22, 2006, the California Supreme Court summarily denied the petition for review without citation of authority. Lodgment 7.

C. Collateral Review

Petitioner did not seek collateral review of his conviction or sentence in the state courts.

On February 20, 2007, Petitioner filed the instant Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. § 2254 alleging three grounds for relief. Doc. No. 1. Respondent timely filed an Answer on July 16, 2007. Doc. No. 9. On August 20, 2007, Petitioner requested an extension of time in which to file a traverse. Doc. No. 11. The Court granted his request and continued the traverse deadline to October 1, 2007 [Doc. No. 12], but as of the date of this report and recommendation, Petitioner has not filed a traverse or sought an additional extension of time in which to do so.

STANDARD OF REVIEW

Title 28 of the United States Code, section 2254(a), sets forth the following scope of review for federal habeas corpus claims:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a).

The Petition was filed after enactment of the Anti-terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), Pub. L. No. 104-

132, 110 Stat. 1214. Under 28 U.S.C. § 2254(d), as amended by AEDPA:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
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> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
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> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. § 2254(d). Summary denials do constitute adjudications on the merits. See Luna v. Cambra, 306 F.3d 954, 960 (9th Cir. 2002). Where there is no reasoned decision from the state's highest court, the Court "looks through" to the underlying appellate court decision. Ylst v. Nunnemaker, 501 U.S. 797, 801-06 (1991).

A state court's decision is "contrary to" clearly established federal law if the state court: (1) "arrives at a conclusion opposite to that reached" by the Supreme Court on a question of law; or (2) "confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to [the Supreme Court's]." Williams v. Taylor, 529 U.S. 362, 405 (2000).

A state court's decision is an "unreasonable application" of clearly established federal law where the state court "identifies the correct governing legal principle from this Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." Lockyer v. Andrade, 538 U.S. 63, 75-76 (2003). "[A] federal habeas court may not issue a writ simply because the

court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly . . . . Rather, that application must be *objectively unreasonable*." Andrade, 538 U.S. at 75-76 (emphasis added) (internal quotation marks and citations omitted). Clearly established federal law "refers to the holdings, as opposed to the dicta, of [the United States Supreme] Court's decisions." Williams, 529 U.S. at 412.

Finally, habeas relief is also available if the state court's adjudication of a claim "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in state court." 28 U.S.C. § 2254(d)(2). A state court's decision will not be overturned on factual grounds unless this Court finds that the state court's factual determinations were objectively unreasonable in light of the evidence presented in the state court proceeding. See Miller-El, 537 U.S. at 340; see also Rice v. Collins, 546 U.S. 333, 341-42 (2006) (the fact that "[r]easonable minds reviewing the record might disagree" does not render a decision objectively unreasonable). This Court will presume that the state court's factual findings are correct, and Petitioner may overcome that presumption only by clear and convincing evidence. 28 U.S.C. § 2254(e)(1).

DISCUSSION

Petitioner raises three grounds for relief in the instant petition. In Ground 1, Petitioner challenges the state court's determination that he knowingly and voluntarily waived his Miranda rights and that he did not unequivocally invoke his right to remain silent. Pet. at 6. In Ground 2, Petitioner argues that his federal

due process rights were violated when the trial court failed to instruct the jury on unreasonable self-defense. Id. at 7. Finally, in Ground 3, Petitioner challenges the trial court's admission into evidence of inflammatory and unnecessary photographs of the victim's massive head wounds. Id. at 8.

In his Memorandum of Points and Authorities in Support of the Answer ("Resp't Mem."), Respondent addresses all three claims on the merits. See Resp't Mem. at 11-22. Specifically, Respondent contends that the Court of Appeal's decisions as to all three claims were neither contrary to, nor unreasonable applications of, United States Supreme Court precedent. Id.

In evaluating the merits of Petitioner's claims, this Court must look through to the last reasoned state court decision. See Ylst, 501 U.S. at 801-06. Here, because the California Supreme Court summarily denied Petitioner's petition on direct review, the last reasoned state court decision on all of the claims presented in this case came from the California Court of Appeal. Lodgment 5.

A. Ground 1 - Petitioner's Confession

Petitioner alleges in his first claim for relief that the state court erred by determining that he knowingly and voluntarily waived his Miranda rights and that he did not unequivocally invoke his right to remain silent. Pet. at 6-7[1]. Petitioner argues that his limited cognitive abilities prevented him from freely waiving his rights and made him more susceptible to the coercive tactics utilized by the interrogating officers. Id.

[1] The Petition contains two pages numbered as "7". In this instance, the Court refers to the second one, which contains a continuation of Ground 1.

Respondent counters that the California state court's determination that Petitioner's Miranda rights were not violated was neither contrary to, nor an unreasonable application of, clearly established federal law, nor was it based on an unreasonable determination of the facts. Resp't Mem. at 11. Respondent argues that the circumstances of Petitioner's initial waiver as well as those surrounding his subsequent statement about not wanting to talk support the state court's conclusion. Id. at 11-15.

1. Waiver of Miranda Rights

Petitioner first alleges that he did not knowingly and voluntarily waive his Miranda rights. The Court of Appeal considered and rejected this claim on the following grounds:

> After being advised of his *Miranda* rights, Bates affirmatively told the detectives that he understood those rights. There is no evidence in the record of the interview that Bates lacked sufficient intelligence to understand those rights or the consequences of his waiver. There is no evidence that the questioning by detectives was overbearing or that they employed intimidation, coercion, or deception to make Bates waive his *Miranda* rights.
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> Indeed, when ruling on the admissibility of the interrogation, the court viewed a videotape of that interview to determine the merits of Bates's claim that he was "intellectually helpless to assert his rights." In rejecting this contention, the court noted Bates's "initial deceptive claim that the blood on his pants was the result of an attempt to perform CPR on the victim, his sophisticated questions regarding the legal consequences of his actions, his reflective analysis of his mental state when he attacked the victim and his skillful alteration of the facts of his story following his confession...." The court found these facts demonstrated that Bates possessed "[a] keen understanding of his situation." The court also found that at all times Bates displayed a willingness and desire to communicate with the detectives and that the interrogation was not coercive. We must accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, where, as here, they are supported by substantial evidence. (*Box, supra,* 23 Cal.4th at

> p. 1194.) The court did not err in finding that Bates's waiver of his *Miranda* rights was knowingly and intelligently made.

Lodgment 5 at 12-13.

This Court must determine whether the Court of Appeal's opinion is contrary to, or an unreasonable application of, clearly established Supreme Court law. Under clearly established federal law, a suspect who is subjected to custodial interrogation must be advised of his federal constitutional right to remain silent and his right to an attorney before questioning commences. Miranda v. Arizona, 384 U.S. 436, 444 (1966). A defendant may waive his Miranda rights "provided the waiver is made voluntarily, knowingly and intelligently." Moran v. Burbine, 475 U.S. 412, 421 (1986). A waiver is "voluntary" if "it was the product of a free and deliberate choice rather than intimidation, coercion, or deception." Id. It is "knowingly and intelligently" made if the defendant had "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Id.; U.S. v. Doe, 155 F.3d 1070, 1074 (9th Cir. 1998). "Only if the 'totality of the circumstances surrounding the interrogation' reveal both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived." Moran, 475 U.S. at 421.

a. Voluntary Waiver

Petitioner contends that he did not voluntarily waive his Miranda rights because the officers used coercive tactics to which he was particularly susceptible due to his limited cognitive abilities. Pet. at 6. As previously discussed, a waiver is "voluntary" if "it was the product of a free and deliberate choice

rather than intimidation, coercion, or deception." Moran, 475 U.S. at 421. "The sole concern of the Fifth Amendment, on which Miranda was based, is governmental coercion." Colorado v. Connelly, 479 U.S. 157, 169-170 (1986). "[W]hile mental condition is surely relevant to an individual's susceptibility to police coercion, mere examination of the confessant's state of mind can never conclude the due process inquiry." Id. at 520-21.

Here, the evidence does not support Petitioner's argument that the interrogating officers used coercive tactics in obtaining his waiver or his claim that his cognitive difficulties prevented him from voluntarily waiving his rights. As an initial matter, there is no indication in the record that Petitioner was handcuffed during the interview or treated roughly while being brought into the interrogation room. See, e.g., Lodgment 1 at 202-04. And, the only questions the officers asked Petitioner before informing him of his Miranda rights were basic informational questions such as the spelling of his name, where he lived, his age, his level of education and the phone number of any family contacts. Id. When Detective Brown read Petitioner his Miranda rights, he confirmed Petitioner's agreement after each one by asking "[d]o you understand?" Id. at 204. Petitioner responded each time Detective Brown asked if he understood by saying "Yea" or "I sure do." Id. Detective Brown then asked "Do you want to tell me what happened tonight out there[?]" and Petitioner immediately began talking. Id. He did not ask any questions about his rights or express any uncertainty. Id. As such, none of the circumstances surrounding Petitioner's waiver suggest that any police coercion occurred or that his waiver was anything but free and deliberate.

Having considered the totality of the circumstances, Moran, 475 U.S. at 421, this Court finds there is no evidence of police overreaching and concludes that the Court of Appeal did not unreasonably apply federal law in determining that Petitioner voluntarily waived his Miranda rights.

b. Knowing and Intelligent Waiver

Petitioner also suggests that his waiver was not knowing and intelligent due to his limited cognitive faculties. Pet. at 6-7. He cites to an expert's trial testimony that Petitioner is within the mild range of mental retardation, has the emotional range of an eight to ten year old, was in special education classes as a child, and likely suffered brain damage at an early age. Id. at 6.

Again, a waiver is only "knowingly and intelligently" made if the defendant had "full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it." Moran, 475 U.S. at 421; Doe, 155 F.3d at 1074. However, "[t]he Constitution does not require that a criminal suspect know and understand every possible consequence of a waiver of the Fifth Amendment privilege." Colorado v. Spring, 479 U.S. 564, 574 (1987). In analyzing the totality of the circumstances, the court may consider several factors including "(i) the defendant's mental capacity; (ii) whether the defendant signed a written waiver; (iii) whether the defendant was advised in his native tongue or had a translator; (iv) whether the defendant appeared to understand his rights; (v) whether the defendant's rights were individually and repeatedly explained to him; and (vi) whether the defendant had prior experience with the criminal justice system." U.S. v. Crews, 502 F.3d 1130, 1140 (9th Cir. 2007). While "[a] defendant's mental

capacity directly bears upon the question of whether he understood the meaning of his Miranda rights and the significance of waiving his constitutional rights," U.S. v. Garibay, 143 F.3d 534, 538 (9th Cir. 1998), courts repeatedly have found that defendants with varying degrees of mental impairment nonetheless retained the capacity to knowingly and voluntarily waive their Miranda rights. See, e.g., Derrick v. Peterson, 924 F.2d 813, 816 (9th Cir. 1990) (finding that defendant with mental age of a nine year old and an I.Q. of 62 was capable of understanding and knowingly and intelligently waiving Miranda rights); U.S. v. Glasgow, 451 F.2d 557, 558 (9th Cir. 1971) (rejecting defendant's argument that he was "of such limited mental capacity that he was incapable of having made a knowing and intelligent waiver" of his Miranda rights); U.S. v. Rosario-Diaz, 202 F.3d 54, 69 (1st Cir. 2000) (upholding waiver by defendant with I.Q. in mid-70s and no prior experience with the criminal justice system over objection that waiver was not knowingly and intelligently made).

In this case, several factors weigh against Petitioner's claim. First, Detective Brown read Petitioner each of his rights individually and Petitioner confirmed that he understood each one. See U.S. v. Bautista-Avila, 6 F.3d 1360, 1366 (9th Cir. 1993) (finding it particularly significant in upholding intelligence of waiver that defendant affirmatively indicated that he understood his rights). Second, the dialogue in the record reflects that Petitioner understood his rights as he did not ask any questions or otherwise signal that he was confused. Lodgment 1 at 202-04. Additionally, there is no evidence suggesting that Petitioner was not a native English speaker so he was advised of his rights in his

native language. Id. Third, the probation officer's report indicates that Petitioner has been arrested on two prior occasions, at least one of which resulted in a conviction, which suggests that he previously has been advised of his Miranda rights and understands the rights involved. While Petitioner may well have cognitive deficiencies, these do not *per se* bar the Court from finding that he intelligently waived his Miranda rights. See, e.g., Derrick, 924 F.2d at 816; Glasgow, 451 F.2d at 558; Rosario-Diaz, 202 F.3d at 69. Therefore, this Court finds under the totality of the circumstances that the Court of Appeal did not unreasonably apply clearly established federal law in concluding that Petitioner knowingly and intelligently waived his rights.

c. Invocation of the Right to Silence

Petitioner also implies that the officers relied on coercive tactics and Petitioner's limited cognitive abilities to prevent Petitioner from invoking his right to remain silent. Pet. at 6-7.

In adjudicating this claim, the Court of Appeal rejected Petitioner's argument that his statement "I'm not saying anything right now" was a clear and unambiguous invocation of the right to remain silent and mandated cessation of questioning. Lodgment 5 at 8-9. After setting forth the Miranda standard and applicable California case law, the appellate court concluded:

> Bates's statement is similar to those cited above and, under the circumstances, did not amount to an unequivocal assertion on his right to remain silent. Prior to the statement, he had given a false version of what had occurred. His statement, in context, that "I'm not saying anything right now" only indicated an unwillingness to talk about certain subjects. At most it sought to alter the course of the detectives' questions, not stop the interview altogether. Further, he gave no indication that he wanted the interview stopped, and continued to answer the

> officers' questions. The trial court correctly found that Bates did not unequivocally invoke his right to remain silent.

Id. at 11. The Court of Appeal thus affirmed the trial court's decision to admit Petitioner's confession into evidence. Id. at 20.

The Supreme Court made clear in Miranda v. Arizona that a suspect may cut off questioning at any time during a custodial interrogation:

> Once warnings have been given, the subsequent procedure is clear. If the individual indicates in any manner, at any time prior to or during questioning, that he wishes to remain silent, the interrogation must cease. At this point he has shown that he intends to exercise his Fifth Amendment privilege; any statement taken after the person invokes his privilege cannot be other than the product of compulsion, subtle or otherwise. Without the right to cut off questioning, the setting of in-custody interrogation operates on the individual to overcome free choice in producing a statement after the privilege has been once invoked.

Miranda, 384 U.S. at 473-474. In subsequently interpreting the Miranda opinion, the Supreme Court concluded that "the admissibility of statements obtained after the person in custody has decided to remain silent depends under Miranda on whether his 'right to cut off questioning' was 'scrupulously honored.'" Michigan v. Mosley, 423 U.S. 96, 104 (1975).

The question of how clear the suspect's assertion of the right to remain silent must be has been addressed by analogy to cases pertaining to invocation of the right to have an attorney present. See Arnold v. Runnels, 421 F.3d 859, 866 n.8 (9th Cir. 2005). Thus, a brief history of law regarding the right to an attorney is instructive. In Edwards v. Arizona, 451 U.S. 477 (1981), the Supreme Court made clear that law enforcement officers must cease questioning immediately if the suspect clearly asserts

his or her right to have counsel present during the custodial interrogation. But, "if a suspect makes a reference to an attorney that is ambiguous or equivocal in that a reasonable officer in light of the circumstances would have understood only that the suspect *might* be invoking the right to counsel," the interrogating officers are not required to cease questioning the suspect. Davis v. United States, 512 U.S. 452, 459 (1994). As the reference to "a reasonable officer" implies, whether or not the invocation is ambiguous is an objective inquiry. Id. at 458-59 (citing Connecticut v. Barrett, 479 U.S. 523, 529 (1987)). And, while the officer is not required to bring the interrogation to a halt in the face of an ambiguous invocation of the right to counsel, the Supreme Court has admonished that "when a suspect makes an ambiguous or equivocal statement it will often be good police practice for the interviewing officers to clarify whether or not he actually wants an attorney" before proceeding. Id. at 461. The Court declined, however, to *require* officers to ask clarifying questions. Id.

In determining whether a suspect has unambiguously invoked his Miranda rights, the words of a Miranda request should be "understood as ordinary people would understand them." Barrett, 479 U.S. at 529; Arnold, 421 F.3d at 864. The suspect need not "speak with the discrimination of an Oxford don." Davis, 512 U.S. at 459 (internal citation omitted); Arnold, 421 F.3d at 865 (noting that "in applying Davis, neither the Supreme Court nor this court has required that a suspect seeking to invoke his right to silence provide any statement more explicit or technically-worded than 'I have nothing to say'"). Nor is any "talismanic phrase, such as 'I invoke my right to silence under the Fifth Amendment'" required.

Arnold, 421 F.3d at 866; see also Emspak v. United States, 349 U.S. 190, 194 (1955) ("no ritualistic formula or talismanic phrase is essential in order to invoke the privilege against self-incrimination").

On habeas review, great deference is given to the state court's factual and legal determinations. In order to reverse under AEDPA, this Court must find either (1) that the Court of Appeal's factual findings were unreasonable and Petitioner rebutted them with clear and convincing evidence (28 U.S.C. § 2254(d)(2)) or (2) that this determination is a question of law and the Court of Appeal's decision unreasonably applied clearly established federal law (28 U.S.C. § 2254(d)(1)).[2] Here, Petitioner does not dispute the facts surrounding the alleged invocation of his right to silence but, rather, challenges the court's legal determination that the statement "I'm not saying anything right now" was not an unequivocal invocation of his right to remain silent.

In the instant case, Petitioner's confession was tape-recorded and the trial court reviewed the tape prior to making its determination. Lodgment 5 at 12. The transcript reveals that before making the challenged statement, Petitioner described the relevant events to the officers. Lodgment 1 at 202-221. Petitioner explained that he knew the victim, that the victim watched his belongings for about two hours while Petitioner went somewhere else, that Petitioner returned to the area and discovered the victim but did not notice anything unusual about the victim's head, that he

[2] See Anderson v. Terhune, 467 F.3d 1208, 1212-13 (9th Cir. 2006), *en banc rehearing granted*, 486 F.3d 1155 (9th Cir. May 14, 2007) (No. 04-17237).

knelt on the ground and administered CPR to the victim, and that he then went to a nearby building to get help. Id. at 202-08. During this part of the transcript, the officers encouraged Petitioner to provide a detailed account of his evening but did not significantly challenge the story. Id. However, after hearing the story, the officers explained to Petitioner that they did not believe he was telling them the complete story and they began to challenge him on specific details of his story and how his story might conflict with other evidence or testimony. Id. at 208-20. In response, Petitioner admitted that he had drunk alcohol during the evening, that he had had a "peaceful argument" with the victim earlier in the day, and that he had nudged the victim with his foot when he first discovered the body. Id. Petitioner again insisted that he had attempted CPR on the victim but had not noticed the condition of the victim's head. Id. at 221. The officers then presented Petitioner with an alternative theory of what transpired that evening. Id. It was in response to this alternative theory that Petitioner made the challenged statement, asserting that "I'm not saying anything right now." Id.

After reviewing these facts by referencing the taped confession and applying the correct law, the appellate court concluded that in context and under the totality of the circumstances, a reasonable officer would not have considered Petitioner's statement to be an unambiguous assertion of his right to remain silent. Lodgment 5 at 7-11. While this Court might reach a different conclusion if the issue were presented to it initially, this Court cannot say that the Court of Appeal's conclusion was unreasonable. See Rice, 546 U.S. at 341-42 (the fact that

"[r]easonable minds reviewing the record might disagree" does not render a decision objectively unreasonable); Andrade, 538 U.S. at 75-76 ("a federal habeas court may not issue a writ simply because the court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly . . . . Rather, that application must be objectively unreasonable"). Because clearly established Supreme Court law does not dictate that Petitioner's statement was an unequivocal invocation of his right to silence nor does it require the officers to make a specific inquiry after such a statement, and because the state court's conclusion was not objectively unreasonable, Petitioner's claim fails.

Even if the Court of Appeal's decision was unreasonable, the error was harmless. The Supreme Court has "repeatedly recognized that the commission of a constitutional error at trial alone does not entitle a defendant to automatic reversal." Washington v. Recuenco, 548 U.S. 212, __, 126 S.Ct. 2546, 2551 (2006). Unless the case presents one of the rare situations where the error is structural and requires automatic reversal, the constitutional error is subject to harmless error analysis. Id. (listing structural errors as including: complete denial of counsel, biased trial judge, racial discrimination in selection of grand jury, denial of self-representation at trial, denial of public trial, and defective reasonable-doubt instruction) (internal citations omitted); see also Arizona v. Fulminante, 499 U.S. 279, 295 (1991) (distinguishing prior precedent in determining that harmless error analysis does apply to coerced confessions). The harmless error analysis dictates that an error is harmless if the court can say with fair assurance

that the error did not have "a substantial and injurious effect or influence in determining the jury's verdict." Brecht v. Abrahamson, 507 U.S. 619, 637 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946)); Arnold, 421 F.3d at 867.

In this case, there was overwhelming evidence establishing that Petitioner killed the victim. The question as presented at trial was whether the killing constituted first degree murder, second degree murder, voluntary manslaughter, or involuntary manslaughter. The jury was instructed on all four crimes. Lodgment 2, vol. 4 at 600-17. The jury rejected the first degree murder allegation and convicted Petitioner of second degree murder. Lodgment 1 at 310, 346; Lodgment 2, vol. 4 at 632. The trial judge told the jury that the difference between second degree murder and manslaughter is that second degree murder requires malice aforethought whereas voluntary manslaughter mandates that there be no malice aforethought but requires an intent to kill or killing with conscious disregard for human life. Lodgment 2, vol. 4 at 609. The trial judge explained that:

> Malice, as used in malice aforethought, may be either express or implied.
>
> Malice is express when there is manifested an intention unlawfully to kill a human being.
>
> Malice is implied when:
>
> 1. The killing resulted from an intentional act;
>
> 2. The natural consequences of the act are dangerous to human life; and
>
> 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

Id. at 606-07. The judge further explained that "[t]here is no

malice aforethought if the killing occurred upon a sudden quarrel or heat of passion or in the actual but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury." Id. at 609. Accordingly, the harmless error analysis focuses on whether the portion of Petitioner's confession after the alleged invocation of silence had "a substantial and injurious effect or influence" on the jury's conclusion that Petitioner possessed malice aforethought as required for second degree murder.

If the challenged portion of Petitioner's confession is excluded, the remaining evidence establishes that Petitioner told Ms. Ruiz at approximately 10:00 p.m. that she should call the police because someone was outside "and it looks like they got their face bashed in." Lodgment 5 at 2. Officers responded and discovered the victim with his "head crushed beyond recognition until he appeared almost headless." Id. at 3. A doctor described the victim's head injuries as similar to those sustained by a "person having their head smashed between a car and the road in a rollover accident or a shotgun blast to the head." Id. at 4. Four rocks, weighing 6.5, 10.5, 19, and 36.5 pounds, were discovered near the body covered with the victim's blood and brain tissue. Id. at 3. The physician also testified that the victim had injuries consistent with "someone jumping on his torso repeatedly." Id. at 4. Petitioner's statements during the first part of his confession (prior to his statement that he's not saying anything right now) establish that he knew the victim, that he had had a "peaceful argument" with the victim earlier in the day, that he returned to the location where the victim was located and where the argument had occurred and

discovered the victim, that he performed CPR on the victim but did not notice the condition of the victim's head, and that he then went to a nearby building to get help. Id. at 3; Lodgment 1 at 202-21. Another physician testified that the victim's blood was on Petitioner's jeans, that the blood patterns on Petitioner's jeans indicated that Petitioner was "within inches" of the victim when the victim was injured, that the blood stains on Petitioner's jeans were inconsistent with Petitioner "kneeling and administering CPR" to the victim, and that the blood staining indicated that the victim sustained multiple blows while lying on his back. Id. at 4. Because no one else was present when the attack occurred[3], if the rest of Petitioner's confession had been suppressed, there would not have been any evidence presented to the jury that Petitioner believed he acted in self-defense.[4]

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[3] Karen Clasey described the altercation that occurred between Petitioner and the victim earlier in the day. Lodgment 2 at 225-32; 240-45. Ms. Clasey described the victim as a person who could become abusive when he drank and Petitioner as someone who usually remained quiet and by himself. Id. Ms. Clasey testified that the fight had ended and the victim still was alive when she left the location. Id.

[4] Petitioner did not say anything about his fear of the victim or his belief that the victim was going to attack him until after he stated that he was "not saying anything right now." Lodgment 1 at 202-45. In the portion of his confession after the challenged statement, Petitioner admitted that he used the rocks to bash the victim's head and rib cage and that he violently kicked the victim. Id. at 222-45. Petitioner also explained that he drank several beers, that he lost his temper, that the victim made him really angry, and that he hit the victim because he believed the victim was going to attack him. Id. The facts asserted in this portion of Petitioner's statement support the arguments for both first degree and voluntary manslaughter. Because the jury rejected both crimes, there is no evidence that the allegedly improper portion of the confession affected the jury's verdict. Accordingly, the error in admitting that portion of the Petitioner's statement, if any, was harmless.

Without the challenged portion of Petitioner's confession, there is overwhelming evidence that Petitioner killed the victim with malice aforethought. The size and number of rocks used and the devastating damage inflicted on the victim's head easily supports the jury's conclusion that Petitioner deliberately and intentionally threw the rocks on the victim's head knowing that such an act likely would endanger the victim's life and that he did so after he fought with the victim earlier in the day. This conclusion is reinforced by the blood evidence and Ms. Ruiz' 911 statement, which establish that Petitioner lied on several critical issues, including how the victim's blood got on him, that he attempted CPR, and that he did not notice the devastating damage to the victim's head. Finally, without the challenged portion of Petitioner's confession, there is no evidence negating the malice aforethought evidence because Petitioner's confession offers the only evidence that the victim presented an immediate danger at the time of the killing or that Petitioner perceived such a danger. Given this evidence, the Court concludes that there is a fair assurance that the admission of the portion of Petitioner's confession after the challenged statement did not have a substantial and injurious effect or influence in determining the jury's verdict. Brecht, 507 U.S. at 637. Accordingly, the error in admitting the remainder of Petitioner's confession, if any, was harmless.

In sum, this Court finds that the California Court of Appeal's decision denying Petitioner's first claim was not contrary to, or an unreasonable application of, clearly established federal law, nor was it an unreasonable determination of the facts in light of the evidence presented. 28 U.S.C. § 2254(d). The Court,

therefore, **RECOMMENDS** that Petitioner's first ground for habeas relief be **DENIED**.

B. Ground 2 - Failure to Instruct on Unreasonable Self-Defense

Petitioner contends that the trial court erred by not, *sua sponte*, instructing the jury on the definition of unreasonable self-defense (CALJIC No. 5.17) and, consequently, violated his federal due process rights. Pet. at 7. He acknowledges the Court of Appeal's argument that substantial evidence of that defense was not present and that, even if it was, the defense was appropriately covered by other instructions so as to render any error harmless. Id. However, because unreasonable self-defense was never *defined* in any of these other instructions, Petitioner argues that the trial court should have separately instructed on this critical aspect of Petitioner's defense. Id.; Lodgment 6 at 11-12.

In response, Respondent argues that Petitioner's claim fails to state a federal question. Resp't Mem. at 15. Even if it does, Respondent submits that the state court's conclusion was not unreasonable. Id.

1. Federal Question

As a preliminary matter, this Court notes that only claims alleging a violation of "the Constitution, laws, or treaties of the United States" are cognizable on federal habeas review. Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); see also 28 U.S.C. § 2254(a). Consequently, to ensure a federal court's review of his claims for relief, a habeas petitioner must allege he is in custody "in violation of the Constitution or the laws or treaties of the United States," see 28 U.S.C. § 2254(a), by citing "provisions of the federal Constitution or . . . either federal or state case law that

engages in a federal constitutional analysis," Fields v. Waddington, 401 F.3d 1018, 1021 (9th Cir. 2005) (explaining requirements for exhaustion purposes).

In his second claim, Petitioner merely asserts that he was denied due process of law as guaranteed under the federal constitution, without specifying any particular constitutional provision. Pet. at 7. Because federal courts are obligated to construe *pro se* pleadings liberally, see Barron v. Ashcroft, 358 F.3d 674, 676 (9th Cir. 2004), this Court interprets Petitioner's claim as alleging that the instructional error violated his constitutional Due Process rights under the Fourteenth Amendment. Such an allegation undeniably states a cognizable claim for habeas relief. Accordingly, this Court finds that Petitioner has alleged a federal violation sufficient to enable review of his claim.

2. Federal Relief

Respondent contends that Petitioner's claim that the state court failed to adequately define unreasonable self-defense challenges only the state court's interpretation of state law and, as such, is not cognizable on federal habeas review. Resp't Mem. at 16. Respondent is correct that this claim is not cognizable on federal habeas review because habeas relief is not available for an alleged error in the interpretation or application of state law. Estelle, 502 U.S. at 67-68; Jammal v. Van de Kamp, 926 F.2d 918, 919 (9th Cir. 1991); see also Dugger v. Adams, 489 U.S. 401, 409 (1989) ("the availability of a claim under state law does not of itself establish that a claim was available under the United States Constitution").

However, to the extent Petitioner argues that the jury was

not instructed on a viable defense that was supported by the evidence, in violation of his federal constitutional rights, this claim is cognizable. Instructional error will support a petition for federal habeas relief if it is shown "not merely that the instruction is undesirable, erroneous, or even 'universally condemned,'" Cupp v. Naughten, 414 U.S. 141, 146 (1973), but that "the ailing instruction by itself so infected the entire trial that the resulting conviction violates due process," id. at 147. "This standard for instructional error applies to ambiguous or omitted instructions." Murtishaw v. Woodford, 255 F.3d 926, 971 (9th Cir. 2001). "An appraisal of the significance of an error in the instructions to the jury requires a comparison of the instructions which were actually given with those that should have been given." Henderson v. Kibbe, 431 U.S. 145, 154 (1977); Murtishaw, 255 F.3d at 971.

Even if the omission in the instructions is found to have violated a petitioner's right to due process, a habeas petitioner can obtain relief only if the unconstitutional instructions had a substantial influence on the conviction and thereby resulted in actual prejudice under Brecht. Brecht requires a court to determine whether the constitutional error "'had a substantial and injurious effect or influence in determining the jury's verdict.'" Brecht, 507 U.S. at 637. Trial errors that do not meet this test are deemed harmless. See Bonin v. Calderon, 59 F.3d 815, 823-24 (9th Cir. 1995); Williams v. Calderon, 52 F.3d 1465, 1476 (9th Cir. 1995) (failure to instruct on element of kidnapping special circumstance subject to Brecht harmless error review).

In this case, Petitioner contends that the trial court had a

duty to instruct the jury *sua sponte* under CALJIC No. 5.17, which provides:

> A person who kills another person in the actual but unreasonable belief in the necessity to defend against imminent peril to life or great bodily injury, kills unlawfully but does not harbor malice aforethought and is not guilty of murder. This would be so even though a reasonable person in the same situation seeing and knowing the same facts would not have had the same belief. Such an actual but unreasonable belief is not a defense to the crime of [voluntary] [or] [involuntary] manslaughter. [¶] As used in this instruction, an "imminent" [peril] [or] [danger] means one that is apparent, present, immediate and must be instantly dealt with, or must so appear at the time to the slayer. [¶] [However, this principle is not available, and malice aforethought is not negated, if the defendant by [his] [her] [unlawful] [or] [wrongful] conduct created the circumstances which legally justified [his] [her] adversary's [use of force], [attack] [or] [pursuit].] [¶] [This principle applies equally to a person who kills in purported self-defense or purported defense of another person.]

Lodgment 5 at 14. As the Court of Appeal highlighted, the trial court did instruct the jury on voluntary and involuntary manslaughter under CALJIC Nos. 8.40 and 8.45, "both of which told the jurors there is no malice aforethought if the killing occurred 'in the honest but unreasonable belief in the necessity to defend oneself against imminent peril to life or great bodily injury.'" Lodgment 5 at 16; Lodgment 2, vol. 4 at 609 (instruction to the jury on voluntary manslaughter) & 612 (instruction to the jury on involuntary manslaughter). Thus, the crux of Petitioner's claim is that the trial court's failure to further clarify the unreasonable self-defense concept by way of a separate instruction "so infected the entire trial that the resulting conviction violates due process." Estelle, 502 U.S. at 71-72.

The Court of Appeal concluded that the trial court had no

duty to instruct *sua sponte* on unreasonable self-defense because there was no substantial evidence that Petitioner killed Sanchez in the unreasonable belief that he was acting in self-defense. Lodgment 5 at 15. "As a general proposition, a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor." Matthews v. United States, 485 U.S. 58, 63 (1988) (noting that "[a] parallel rule has been applied in the context of a lesser included offense instruction"). In other words, due process requires defense instructions to be given only when the evidence warrants such an instruction. See Hopper v. Evans, 456 U.S. 605, 611 (1982). Under California law, unreasonable self-defense is not actually a defense, but rather a shorthand description of one form of voluntary manslaughter. People v. Barton, 12 Cal. 4th 186, 200 (1995). "Accordingly, when a defendant is charged with murder the trial court's duty to instruct sua sponte, or on its own initiative, on unreasonable self-defense is the same as its duty to instruct on any other lesser included offense." Id. at 201. The duty arises whenever there is substantial evidence that "the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense." Id. In this case, the Court of Appeal noted that Petitioner confessed to voluntarily killing Sanchez while he was sleeping. Lodgment 5 at 15. It found that Petitioner's "later attempt to justify the killing by telling detectives that Sanchez had 'come at him' was simply not credible, nor was his initial statement that the blood got on his clothes because he was performing CPR on Sanchez." Id. As such, the Court of Appeal

concluded that the trial court had no duty to instruct *sua sponte* with CALJIC 5.17 because there was not substantial evidence in the record that Petitioner honestly believe he was in imminent peril. Id. at 15-16.

On this record, this Court finds that the Court of Appeal's determination of the facts was reasonable. Unreasonable self-defense is not a defense under California law and the trial court properly instructed the jury on the lesser included offenses of voluntary and involuntary manslaughter. Moreover, the trial court reasonably determined that there was no credible evidence that Petitioner believed he was acting in self-defense, see 28 U.S.C. § 2254(e)(1) (this Court will presume that the state court's factual findings are correct absent clear and convincing evidence to the contrary), and Petitioner has not directed the Court to any evidence in the record for a reasonable jury to find Petitioner acted in unreasonable self-defense, Matthews, 485 U.S. at 63. Given that the jury ultimately rejected all self-defense theories, imperfect or otherwise, in concluding that Petitioner acted with the requisite malice to support a second-degree murder conviction, it is logical to assume that a more comprehensive instruction on unreasonable self-defense would not have affected their verdict. See Henderson, 431 U.S. at 156 (reasoning that "since it is logical to assume that the jurors would have responded to an instruction on causation consistently with their determination of the issues that were comprehensively explained, it is equally logical to conclude that such an instruction would not have affected their verdict"). Accordingly, the Court rejects the suggestion that omission of a more complete instruction on unreasonable self-defense "so infected

the entire trial that the resulting conviction violated due process." Estelle, 502 U.S. at 71-72.

Furthermore, as the Supreme Court recognized under similar facts in Henderson, the likelihood of obtaining relief based on this type of claim is remote. In Henderson, the New York murder statute, under which the defendant was convicted, provided "'(a) person is guilty of murder in the second degree' when '(u)nder circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person.'" Henderson, 431 U.S. at 148. The defendant challenged the trial court's failure to specifically instruct the jury on the definition of causation, which the court of appeal defined as involving "ultimate harm" that "should have been foreseen." Id. at 152, 155. On federal habeas review, the Supreme Court stated:

> In this case, the respondent's burden is especially heavy because no erroneous instruction was given; his claim of prejudice is based on the failure to give any explanation beyond the reading of the statutory language itself of the causation element. An omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law.

Id. at 155. Upon the facts before it, the Supreme Court concluded that in light of the other instructions given in the case, omission of more complete instructions on the causation issue did not "so infect[] the entire trial that the resulting conviction violated due process." Id. at 156. The jurors had been instructed on recklessness and returned a verdict finding that the defendant had, in fact, been reckless. Id. Because a finding of recklessness necessarily includes a determination that the ultimate harm was foreseeable (the definition of causation), the jury did find

causation and the Court, therefore, concluded that an additional instruction would not likely have affected the verdict. Id. Moreover, the Supreme Court determined that even if it made the assumption that the jury would have reached a different verdict upon hearing the additional instruction, "the possibility is too speculative to justify the conclusion that constitutional error was committed." Id. at 157.

This Court finds the instant case analogous to Henderson. Here, the Court need not even make as great an inference as the Henderson court because in this case the trial court actually instructed the jury twice on unreasonable self-defense. Though CALJIC 5.17 provides more elaboration, the jurors were fully informed that unreasonable self-defense negates the element of malice aforethought necessary for a murder conviction. They nonetheless convicted him of second degree murder, thus implying that the omission of the instruction did not "so infect[] the entire trial that the resulting conviction violated due process." Estelle, 502 U.S. at 71-72. Furthermore, the substantial coverage of this issue by the voluntary and involuntary manslaughter instructions, coupled with the absence of credible evidence of unreasonable self-defense, supports the Court of Appeal's conclusion that the jury's conclusion would have been the same even if the trial court had instructed with CALJIC 5.17 and that any error, therefore, was harmless. Brecht, 507 U.S. at 637; Bonin, 59 F.3d at 823-24.

Accordingly, this Court concludes that Petitioner's claim does not provide a basis for federal habeas relief and **RECOMMENDS** that Petitioner's second ground for relief be **DENIED**.

C. Ground 3 - Admission of Photographs of the Victim

In his third ground for relief, Petitioner alleges that the trial court abused its discretion in admitting inflammatory and unnecessary photographs of the victim's head. Pet. at 8. Petitioner argues that the highly prejudicial nature of these photographs greatly exceeded their probative value and likely influenced the jury to impose a second degree murder conviction as a compromise. Id.

Respondent submits that Petitioner has once again failed to state a federal claim but that, regardless, the state court's rejection of his claim regarding the admission of these photographs was not contrary to or an unreasonable application of United States Supreme Court law nor was it an unreasonable factual determination. Resp't Mem. at 19-20.

The Court of Appeal succinctly described the factual background of this issue as follows:

A. *Background*

> At trial, the people sought to introduce photographs of the crime scene, including depictions of Sanchez as officers found him, as well as photos taken at the autopsy that depicted his injuries. Defense counsel objected under Evidence Code section 352 that photos depicting Sanchez's head injuries were prejudicial and cumulative of testimony. The People responded that the photos were highly relevant and probative to show the malice necessary to support a first degree murder conviction, the injuries suffered by Sanchez, and the savageness of the attack. The People also argued that the photographs would assist the jury in understanding expert testimony.
>
> The court, after weighing the pictures' prejudice against their relevance, decided that one photograph depicting Sanchez at the crime scene and one photograph of his head injuries taken at the autopsy would be admitted. The court found that although the photographs were gruesome, they were highly probative of the central issue in the case: Bates's mental

> state.
>
> The court also tried to devise a manner in which to present the photographs in the least sudden or upsetting fashion. The crime scene photograph was presented as part of a photoboard, which included pictures of the four rocks, Sanchez, and the backpack, which demonstrated the directionality of the blood drops, as well as the positioning of the rocks. The court also ruled that the photographs would be introduced during voir dire in order to further guard against any emotional disturbance of shock.

Lodgment 5 at 17-18. After setting forth the applicable state law regarding the trial court's discretion in admitting prejudicial evidence under California Evidence Code § 352, the Court of Appeal concluded as follows:

> Here, the court did not abuse its discretion in allowing the photographs into evidence. The court only allowed two out of numerous photos depicting Sanchez's massive head wounds. The court also attempted to minimize the potential shock or prejudice by presenting them during voir dire. Additionally, the photos were highly probative because they accurately depicted the injuries, were relevant to a determination of malice, and assisted the pathologist testifying to the cause of death. Thus, the court did not abuse its discretion by admitting photographs of Sanchez's head injuries.

Id. at 18-20.

Generally, the admissibility of evidence is a matter of state law, and is not reviewable in a federal habeas corpus proceeding. See Estelle, 502 U.S. at 67; Middleton v. Cupp, 768 F.2d 1083, 1085 (9th Cir. 1985). Notwithstanding this general proposition, a trial court's admission of prejudicial evidence may warrant habeas relief if the admission was fundamentally unfair and resulted in a denial of due process. Estelle, 502 U.S. at 72. The failure to comply with state rules of evidence alone, however, is neither a necessary nor a sufficient basis for granting federal habeas relief on due

process grounds. See Jammal v. Van de Kamp, 926 F.2d 918, 919-20 (9th Cir. 1991). Only if there are no permissible inferences that the jury may draw from the evidence can its admission rise to the level of a due process violation. Id. at 920. Even then, the evidence in question must "be of such quality as necessarily prevents a fair trial." Id. (quoting Kealohapauole v. Shimoda, 800 F.2d 1463, 1465 (9th Cir. 1986)).

As an initial matter, Respondent is correct that nowhere in Petitioner's claim does he argue that admission of these photographs violated clearly established federal law as determined by the Supreme Court. Therefore, this issue is inappropriate for § 2254 review. Houston v. Roe, 177 f.3d 901, 910 n.6 (9th Cir. 1999).

However, even if Petitioner had alleged that the trial court's actions rose to the level of a federal due process violation, his claim would fail. In order to demonstrate a due process violation, Petitioner must show that there are no permissible inferences that the jury could have drawn from the evidence. Jammal, 926 F.2d at 919-20. As the appellate court explained, the photographs in this case helped the jury determine whether or not Petitioner acted with malice when he killed Sanchez. The trial judge instructed the jury that:

> Malice, as used in malice aforethought, may be either express or implied.
>
> Malice is express when there is manifested an intention unlawfully to kill a human being.
>
> Malice is implied when:
>
> 1. The killing resulted from an intentional act;
>
> 2. The natural consequences of the act are dangerous to human life; and

> 3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

Lodgment 2, vol. 4 at 606-07. Under these instructions, the photographs depicting how Sanchez' head was so torn apart that his brain had actually been pushed out of his head certainly would allow the jury to infer that Petitioner struck Sanchez with the intent to kill him. Alternatively, the photographs support the inference that Petitioner acted with conscious disregard for human life when he hit Sanchez in the head, repeatedly, with several large rocks. The extent of Sanchez' injuries, as evidenced in the photographs, also could lead the jury to the conclusion argued by Petitioner's counsel – that Petitioner acted in the heat of passion and thus, was guilty only of voluntary manslaughter. Lodgment 2, vol. 4 at 578-581 (defense counsel's closing argument that "what this horrible, gruesome picture shows . . . [is] heat of passion"). In sum, it cannot be said that no permissible inference could be drawn from the photographs, Jammal, 926 F.2d at 919-20, such that their admission was fundamentally unfair and resulted in a denial of due process, Estelle, 502 U.S. at 72. In addition, the Court notes that the trial court attempted to minimize the prejudice by limiting the number of photographs presented to the jury and the manner in which they were presented. Lodgment 5 at 17-20.

Accordingly, this Court finds that the California Court of Appeal's decision denying Petitioner's claim was neither contrary to, nor an unreasonable application of, clearly established federal law. See Williams, 529 U.S. at 412-13. The Court, therefore, **RECOMMENDS** that Petitioner's third ground for habeas relief be **DENIED**.

CONCLUSION AND RECOMMENDATION

In sum, this Court finds that Petitioner has failed to establish that the California Court of Appeal's decision as to his claims was contrary to, or an unreasonable application of, clearly established federal law. See 28 U.S.C. § 2254(d). Nor has Petitioner made any argument that further factual development is necessary, such that an evidentiary hearing would be warranted. See 28 U.S.C. § 2254(e)(2) (exceptions where an evidentiary hearing may be appropriate). As such, this Court **RECOMMENDS** that Petitioner's Petition for Writ of Habeas Corpus be **DENIED** and the case dismissed with prejudice.

For all the foregoing reasons, **IT IS HEREBY RECOMMENDED** that the District Court issue an Order: (1) approving and adopting this Report and Recommendation, and (2) directing that Judgment be entered denying the Petition.

IT IS HEREBY ORDERED that any written objections to this Report must be filed with the Court and served on all parties **no later than February 22, 2008**. The document should be captioned "Objections to Report and Recommendation."

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IT IS FURTHER ORDERED that any reply to the objections shall be filed with the Court and served on all parties **no later than March 7, 2008**. The parties are advised that failure to file objections within the specified time may waive the right to raise those objections on appeal of the Court's order. See Turner v. Duncan, 158 F.3d 449, 455 (9th Cir. 1998).

DATED: February 8, 2008

BARBARA L. MAJOR
United States Magistrate Judge

COPY TO:

HONORABLE MARILYN L. HUFF
UNITED STATES DISTRICT JUDGE

ALL COUNSEL AND PARTIES